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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| PHILIP J. MARTINET, Individually, On Behalf of All Others Similarly Situated, and on Behalf of the General Public,<br><br>Plaintiff,<br><br>v.<br><br>SPHERION ATLANTIC ENTERPRISES LLC, a Delaware Limited Liability Company; and DOES 1 through 50, inclusive,<br><br>Defendant. | Case No. 07 CV 2178 W (AJB)<br><br>**DEFENDANT SPHERION ATLANTIC ENTERPRISES LLC'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 26(c)**<br><br>**Date:** **May 16, 2008**<br>**Time:** **10:00 a.m.**<br>**Courtroom:** **A – First Floor**<br>**Judge:** **Hon. Anthony J. Battaglia** |

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Spherion Atlantic Enterprises, LLC ("Spherion") seeks a protective order pursuant to Federal Rule of Civil Procedure 26(c) prohibiting plaintiff Philip Martinet from propounding or compelling oppressive and burdensome state-wide class discovery against Spherion. There is good cause for a protective order because the state-wide discovery Martinet seeks has no chance of supporting his class allegations and would require Spherion to expend over a half-million dollars on what amounts to a fishing expedition.

Spherion is a staffing company with over 50 local offices in California that place thousands of employees at tens of thousands of different job assignments throughout the state. Martinet is a former employee who worked at Spherion for less than six weeks on a small project that provided IT support to a customer (Electronic Data Systems, Inc.) of one of Spherion's clients (Dell). There is only a small handful of Spherion employees who share the same job duties, procedures, and working conditions applicable to Martinet.

Despite the uniqueness of Martinet's employment, he filed a formulaic class-action complaint seeking to represent a state-wide class of all non-exempt Spherion employees from September 2003 to the present. Plaintiff's overbroad class definition consists of well over 10,000 employees working in almost every industry imaginable and subject to 15 different California Wage Orders. The proposed class includes employees placed by Spherion at tens of thousands of different projects over a four-year period, many with their own unique set of practices, procedures, and operative employment documents. There is no conceivable way Martinet can demonstrate he is an adequate representative for a putative class of diverse state-wide Spherion employees in thousands of different job assignments across multiple industries. The class allegations in his complaint are baseless and class discovery will only undermine his class allegations.

The Ninth Circuit has long required that a plaintiff make a prima facie showing of the Rule 23 class-action requirements prior to permitting class discovery. *Doninger v. Pacific Northwest Bell,* 564 F.2d 1304, 1312-13 (9th Cir. 1977); *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985). Plaintiff cannot make this showing and no amount of discovery will substantiate his class allegations. Spherion is not an employer like Wal-Mart or Starbucks with standardized operations and employees performing similar job functions under the guise of uniform company-wide policies and procedures. Spherion is a unique, multifaceted recruiting agency that provides employees to more than 3,000 diverse businesses, government agencies, and non-profit entities at over 15,000 different locations throughout California. The job titles, job descriptions, working conditions, and operative employment documents for Spherion employees are legion.

Without a basis to support his class-allegations, plaintiff propounded state-wide class discovery seeking, among other things, all policies and procedures, handbooks, meal and rest period compliance records, and training documentation for all Spherion employees in California. To comply with such a request, Spherion would have to spend hundreds of thousands of dollars and thousands of hours culling through the records of thousands of unique and individualized job placement assignments throughout the state. In the process, Spherion also would be required to disclose the personal information of thousands of its personnel (many of whom only worked with the company for a few days or less) in violation of their privacy rights. A protective order is necessary to prevent this oppressive and unnecessary fishing expedition.

## II. SUMMARY OF RELEVANT FACTS

### A. Spherion Is A Multifaceted And Complex Staffing Company.

Spherion is a staffing company that provides job assignments to thousands of individuals in California and throughout the United States and Canada. (Declaration of Joan L. Orzo in Support of Defendant's Motion ("Orzo Decl.") ¶ 4.) Spherion recruits and hires individuals and assigns them to businesses, government agencies, non-profit entities, and other organizations throughout the country under a variety of different contracts and service agreements. (Orzo Decl. ¶ 4.) Spherion supplies recruits to almost every industry imaginable, including: retail, healthcare, construction, legal services, manufacturing, pharmaceuticals, commercial and residential real estate, insurance, mortgage and loan, automotive, plumbing, financial services and banking, securities, consumer credit, engineering, waste collection, education, public utilities, airline, cable and internet, media, business services, packaging and shipping, food services, beverage and wine, bottling, computers and electronics, entertainment and motion picture, transportation, travel and hotel, agriculture, marketing and advertising, telecommunications, publishing, internet, information technology, charitable and religious, military, county and city government, and numerous state agencies. (Orzo Decl. ¶ 4.)

There are currently over 600 local Spherion offices throughout the United States. (Declaration of Alfredo Echeverria in Support of Defendant's Motion ("Echeverria Decl.") ¶ 4.) Over the last four years there have been between 45 and 58 local offices in California. In addition, there are currently 9 Spherion licensees and 2 Spherion franchisees in California. (Echeverria Decl. ¶ 4.) Some Spherion offices are operated directly by the company and service a number of clients in a particular area. (Orzo Decl. ¶ 7.) Other offices are on the premises of a particular client's office, where Spherion only services that particular client. Yet other offices are run by the franchisees or licensees.[1] (Orzo Decl. ¶ 7.)

Spherion is a multifaceted business with a multi-layered organizational structure. Spherion has two primary business units/divisions – Staffing Services and Professional Services. (Orzo Decl. ¶ 11.) Recently, however, Spherion has acquired several businesses and these units/divisions have splintered into multiple divisions or groups. (Orzo Decl. ¶ 11; Declaration of Scott Holland in Support of Defendant's Motion ("Holland Decl.") ¶ 8.) Within each unit/division there are multiple employee classifications with thousands of different job titles. (Orzo Decl. ¶ 11; Holland Decl. ¶ 3.) Within each classification and job title there are employees performing a wide range of activities and duties in a variety of different industries for a variety of different clients. (Orzo Decl. ¶ 11; Holland Decl. ¶ 3.) In addition to personnel that Spherion places on assignment, Spherion has a number of full-time employees who work in local offices and manage Spherion's day-to-day operations. (Orzo Decl. ¶ 6; Holland Decl. ¶ 3.)

[1] Spherion licensees have and manage their own office employees, while Spherion provides support and management for temporary staff recruited and placed by the licensee. Spherion franchisees on the other hand manage and control both their on-site office staff as well as the temporary staff recruited and placed by the franchisee. (Orzo Decl. ¶ 7.)

**B. Spherion Personnel Serve Thousands Of Clients On Multitudinous Assignments.**

Spherion serves over 3,000 clients with over 15,000 locations in California on thousands of different projects and assignments. (Echeverria Decl. ¶ 5.) Spherion's clients range from large fortune 500 companies to small local (mom-and-pop) businesses. Spherion's clients also include government agencies, charitable and religious organizations, and non-profit entities. (Echeverria Decl. ¶ 5.) Although Spherion has some longstanding clients, there is a high rate of attrition among a portion of Spherion's clientele as businesses and organizations come and go or sporadically use Spherion's services. Spherion's clientele and the assignments it recruits for change on a daily basis. (Orzo Decl. ¶ 9.)

Each year Spherion recruits thousands of individuals in California for assignments at thousands of different locations with thousands of different clients. (Echeverria Decl. ¶ 6.) Spherion personnel provide a wide range of services including general labor and production work, administrative and office support, managerial and professional work, and skilled, technical and scientific work. (Orzo Decl. ¶ 5.) Spherion personnel may support or supplement regular workforces; provide assistance in special work situations such as employee absences, skill shortages, and seasonal workloads; or perform special assignments or projects. (Orzo Decl. ¶ 5.) Assignments last anywhere from a few hours to multiple days, weeks, months, or even years. (Orzo Decl. ¶ 5; Holland Decl. ¶ 3.)

The duties and working conditions of Spherion personnel vary according to the account and project to which they are assigned. (Orzo Decl. ¶ 6.) Spherion personnel have thousands of different job titles and perform thousands of different job duties. An employee's job title may or may not accurately describe what he or she actually does on a day-to-day basis as job duties and requirements are unique to each client. (Orzo Decl. ¶ 11; Holland Decl. ¶ 3.) The job duties of a Spherion employee are highly dependent on individual client and customer needs. (Orzo Decl. ¶ 11.) Work assignments and projects are often very unique and specifically tailored to a client or the client's customer's needs. (Holland Decl. ¶ 4.)

The terms of an assignment frequently are dictated by a contractual agreement between Spherion and its client. (Orzo Decl. ¶ 10; Holland Decl. ¶ 4.) These contractual agreements often involve multiple parties when, for example, Spherion provides staffing for the customers of a client. (Orzo Decl. ¶ 10.) Working conditions, procedures, and practices for Spherion personnel may vary by client and the client's customer, and often depend on the nature of the relationship between Spherion, its clients, and the clients' customers. Some clients require that their own procedures or their customers' procedures affecting employees be utilized, while others follow Spherion's general policies.[2] (Orzo Decl. ¶ 10.)

Although Spherion has general policies, many of Spherion's policies are customized or modified at the local branch offices or by the franchisees or licensees. These policies are further modified and customized for individual clients, their customers, and various projects. Actual procedures and practices vary widely from office to office, client to client, and project to project. (Orzo Decl. ¶ 8; Holland Decl. ¶ 4.)

### C. Plaintiff Worked On A Very Unique Assignment For Two Months.

Plaintiff Philip Martinet's assignment was unique. Plaintiff was recruited by Spherion's Professional Services unit/division out of a branch office in San Diego. (Orzo Decl. ¶ 12; Holland ¶ 5; Declaration of Joel Scully in Support of Defendant's Motion ("Scully Decl.") ¶ 3.) He was recruited for a project called the Dell Very Small Site Deployment-Navy Marine Corps Intranet ("VSSD-NMCI") project. (Scully Decl. ¶ 2-3.) Plaintiff was recruited as a PC Technician on the project. (Scully Decl. ¶ 3.)

The VSSD-NMCI project serviced Spherion's client, Dell Marketing L.P. ("Dell"), and Dell's customer Electronic Data Systems ("EDS"). (Scully Decl. ¶ 2.) The project was governed by an addendum to a general service agreement between Spherion and Dell in which EDS was a third-party beneficiary. (Scully Decl. ¶ 4, Exhibit A.) Under the addendum, Spherion provided a number of technicians, including plaintiff, to Dell and EDS. (Scully Decl. ¶

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[2] Spherion's human resource managers have provided just a few examples in their declarations of the different job assignments and unique working conditions of Spherion personnel. (Orzo Decl. ¶¶ 13-14; Holland Decl. ¶¶ 6-7.) The actual permutations of Spherion job assignments are legion.

4-5.) The addendum addressed management of the technicians on the project, their roles, responsibilities, schedules, travel, time sheets, and payment. (Scully Decl. ¶ 4, Exhibit A.)

Pursuant to the addendum between Spherion and Dell, the VSSD-NMCI project was serviced by a sales executive in Austin, Texas, who acted as a liaison between Spherion and Dell. (Scully Decl. ¶¶ 1-2.) The technicians were to perform technical service and support at Navy Marine Recruiting Stations throughout the United States that EDS serviced. Plaintiff was one of those technicians responsible for setting up and troubleshooting the computer hardware and software used at the recruiting stations. (Scully Decl. ¶ 5.)

Plaintiff's project and job duties were unique. There were only 8 employees who worked as traveling PC technicians supporting this project, and only 4 were based out of California. (Scully Decl. ¶ 6.) Dell and EDS were responsible for coordinating technician activities on the VSSD-NMCI project. Plaintiff worked independently and was not supervised by any Spherion personnel at any of the recruiting stations. (Scully Decl. ¶ 7.) Plaintiff worked on the project from July 5, 2007 to August 17, 2007 before he quit his employment at Spherion. (Scully Decl. ¶ 8.)

### D. Plaintiff Sued Spherion Seeking To Represent A State-Wide Class.

After working for less than six weeks on a unique assignment, plaintiff quit his job with Spherion. Five weeks later, plaintiff filed a formulaic class-action complaint seeking to represent all "current and former California-based, hourly non-exempt employees" employed by Spherion from September 25, 2003 to the present. (Declaration of Brandon R. McKelvey in Support of Defendant's Motion ("McKelvey Decl.") ¶ 2, Exhibit A ¶ 25.) The complaint alleged state-wide violations of California's wage-and-hour laws related primarily to the payment of overtime, business expenses, and the provision for meals and rest periods. (McKelvey Decl. ¶ 2, Exhibit A ¶¶ 31-66.) Plaintiff filed a First Amended Complaint ("FAC") on December 19, 2007 making the same allegations while adding a cause of action for penalties under the California Labor Code Private Attorney General Act of 2004. (McKelvey Decl. ¶ 3, Exhibit B ¶¶ 67-77.)

Plaintiff's FAC estimates that there are 50,000 members in the proposed class. (McKelvey Decl. ¶ 3, Exhibit B ¶ 26.)

### E. Plaintiff Served Exhaustive State-Wide Discovery To Which Spherion Objected.

On February 8, 2008 plaintiff served requests for production of documents seeking state-wide discovery of "any and all documents" from January 2003 to the present "pertaining to" policies and procedures, training manuals, employee handbooks, meal-and-rest-period compliance and studies, and other employment information for all non-exempt California former and current employees (Document Requests 3-8, 10-13, 15-21). (McKelvey Decl. ¶ 5, Exhibit D.) Plaintiff also served interrogatories seeking additional state-wide information including the names, addresses, employment dates, job titles, and job descriptions of all Spherion's California employees from September 2003 to the present and the total number of those employees (Interrogatories 1-3). The interrogatories also requested detailed information about various meal break, overtime, and payroll policies for all non-exempt employees in California from September 2003 to the present (Interrogatories 4-13). (McKelvey Decl. ¶ 6, Exhibit E.)

Spherion timely served objections and responses to plaintiff's discovery. Spherion objected to each of the document requests and interrogatories calling for state-wide class discovery on multiple grounds. First, Spherion objected that the discovery was premature because plaintiff had not yet established a prima facie showing that the class-action requirements of Rule 23 were satisfied or that the discovery would likely produce substantiation class allegations. Second, Spherion objected that class discovery was not reasonably calculated to lead to discovery of admissible evidence as the information and documents sought were irrelevant to certification of a class of employees similarly situated to and sharing typicality and commonality with the plaintiff. Third, Spherion objected that class discovery was an oppressive and burdensome fishing expedition as the discovery related to thousands of employees at hundreds of locations throughout the state subject to diverse working conditions. Finally, as to the interrogatories that requested personal information for thousands of Spherion employees, Spherion objected on the grounds of state privacy rights. (McKelvey Decl. ¶¶ 9, 10, 14, 15, Exhibits H, I, M, N.)

**F. The Parties Met And Conferred On The Discovery But Reached An Impasse.**

The parties met and conferred on the subject of state-wide discovery on several different occasions during which counsel agreed there was a dispute as to whether and to what extent state-wide class discovery was appropriate. (McKelvey Decl. ¶¶ 4, 7, 9.) The parties brought this issue to the attention of the magistrate in their joint discovery plan, which was submitted on March 10, 2008. (McKelvey Decl. ¶ 8, Exhibit G.) Thereafter, pursuant to an agreement between the parties, Spherion served plaintiff with objections to several of the discovery requests in dispute. (McKelvey Decl. ¶¶ 9-10, Exhibits H, I.) On March 19, 2008 plaintiff sent a lengthy meet and confer letter to defense counsel stating his position on state-wide discovery. (McKelvey Decl. ¶ 11, Exhibit J.) Spherion served responses and objections to the remainder of the discovery on April 2, 2008. (McKelvey Decl. ¶¶ 14-15, Exhibits M, N.)

On March 21, 2008, a case management conference was held with the Honorable Magistrate Anthony Battaglia. At the conference, the dispute between the parties regarding state-wide class discovery was discussed. The parties agreed that no further meet and confer was necessary, and the issue was ripe for the magistrate's review. This Court issued an order setting a hearing on defendant's motion for protective order on May 16, 2008. (McKelvey Decl. ¶ 12, Exhibit K.)

**G. Responding To State-Wide Class Discovery Would Require Thousands Of Man Hours And Cost Spherion Or Plaintiff Hundreds Of Thousands Of Dollars.**

Joan Orzo, a corporate HR manager for Spherion, has reviewed plaintiff's state-wide discovery requests and has concluded that responding to the requests "would be a gargantuan task" that would require 24,800 man hours at a total expense exceeding $550,000. (Orzo Decl. ¶ 15.) Another HR manager has reviewed Orzo's estimates and believes they are conservative, and that responding to plaintiff's discovery actually could take significantly longer and cost significantly more. (Holland Decl. ¶ 8.)

As Spherion's HR managers describe in their declarations, searching for and gathering all the requested documents and information would take an inordinate amount of time because thousands of individualized inquiries would have to be made – client by client and assignment by assignment. (Orzo Decl. ¶ 15; Holland Decl. ¶ 8.) The location of various employee handbooks, human resources documentation, and procedures varies from office to office, division to division, client to client, and project to project. (Orzo Decl. ¶ 15.) Hundreds, if not thousands, of contracts would have to be pulled and consulted. Many clients would have to be individually contacted and document searches would have to take place at numerous branch offices and client locations. (Orzo Decl. ¶ 23.) There have been thousands of different projects staffed by Spherion recruits over the last several years. To identify, review and gather all the different policies, procedures, handbooks, training materials, and other documents requested by plaintiff for thousands of employees with thousands of different job duties and titles would require a tremendous amount of work. (Orzo Decl. ¶ 23.)

Orzo's declaration describes an elaborate three step information gathering process, involving over one hundred different Spherion employees at three different levels of the company (not including the frequent involvement of Spherion's clients). (Orzo Decl. ¶ 23-26.) The first step would involve an HR manager initiating contact with each branch office, licensee, or franchisee (of which combined there are over 50 in California), and communicating the requested information and identifying a plan of action. (Orzo Decl. ¶ 24.) The next step would require a branch manager, with the help of a branch-level employee (such as a Client Services Supervisor ["CSS"]) to generate a list of clients and accounts for the time period in question, and to search for any responsive documents kept at the branch office level. (Orzo Decl. ¶ 25.)

The third step would be the most taxing and would require at least one CSS employee at each office location to inquire as to the policies, procedures, and practices applicable to each client/customer site, and/or each project or assignment. (Orzo Decl. ¶ 26.) This would require the CSS to reach out to the client directly to determine: (a) what policies, procedures, and practices were observed on various projects and assignments; and (b) what documents, if any, the client retained related to policies, procedures, and working conditions. In some instances, customers of the client may have to be contacted and asked to search for information and/or documents. This step alone likely would take an estimated 8 hours for each of over 3,000 clients (over 24,000 man hours).[3] (Orzo Decl. ¶ 26, 29.)

In summary, responding to plaintiff's discovery requests at issue here would require an estimated 25,160 man hours, which is the equivalent of 3,145 work days or over 12 work years. (Orzo Decl. ¶¶ 23-29; Echeverria Decl. ¶ 8.) The total cost of responding to plaintiff's statewide discovery requests is estimated at $585,000. (Orzo Decl. ¶¶ 23-29; Echeverria Decl. ¶ 8.)

## III. LEGAL STANDARD

A district court enjoys broad discretion in controlling discovery. *Little v. City of Seattle,* 863 F.2d 681, 685 (9th Cir. 1988). Prior to certification of a class action, discovery is generally limited and in the discretion of the court. *Kamm v. California City Development Co.*, 509 F.2d 205, 209-210 (9th Cir. 1975); *Del Campo v. Kennedy*, 236 F.R.D. 454, 459 (N.D. Cal. 2006). District courts have the authority to and often exercise their discretion to impose prohibitions or limitations on class discovery. *See Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) (finding court has discretion to deny plaintiff's attempt to obtain discovery in order to solicit support for his effort to certify a class); *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 234 (2nd Cir. 2006) (holding significant limitations on pre-class certification discovery implemented by district court were not an abuse of discretion); *Hill v. Eddie Bauer*, 242 F.R.D. 556, 564-565 (C.D. Cal. 2007) (limiting pre-class certification discovery to a sample of defendant's documents); *Tracy v. Dean Witter Reynolds,* 185 F.R.D. 303, 304 (D. Col. 1998) (restricting discovery to one of defendant's 400 offices prior to class certification).

Upon a showing of good cause, the district court may issue any protective order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or

[3] The above estimates could easily be overrun because in many instances it likely will be more difficult and will take longer to locate documents due to many factors including: client and employee attrition; short duration assignments; Spherion's recent acquisitions of several staffing companies; client businesses that are no longer operating; employees or managers who have contact information regarding clients but are no longer employed with Spherion; and documents or data that have been archived and are not easily accessible. (Orzo Decl. ¶ 30; Holland ¶ 8.)

undue burden or expense, including any order prohibiting the requested discovery altogether, limiting the scope of the discovery, or fixing the terms of disclosure." *Rivera v. NIBCO, Inc.* 364 F.3d 1057, 1063 (9th Cir. 2004) (quoting Federal Rule of Civil Procedure 26(c)(1)). Protective orders provide a safeguard for parties and other persons in light of the otherwise broad reach of discovery. *See* Fed. R. Civ. Proc. 26(c), Advisory Comm. Notes (1970); *United States v. CBS. Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1982). In determining whether good cause exits for the protective order, the Court must balance the interests in allowing discovery against the relative burdens to the parties and non parties. *In re Coordinated Pretrial Proceedings,* 669 F.2d 620, 623 (10th Cir. 1982); *see also Wood v. McEwen,* 644 F.2d 797, 801-801 (9th Cir. 1981).

## IV. LEGAL ARGUMENT

### A. Plaintiff Is Not Entitled To State-Wide Class Discovery Because He Cannot Make A Prima Facie Showing Of Rule 23 Class-Action Requirements.

The Ninth Circuit has long required that a plaintiff make a prima facie showing of the Rule 23 class-action requirements prior to permitting class-wide discovery. *Doninger, supra,* 564 F.2d at 1312-13; *Mantolete, supra*, 767 F.2d at 1424; *Del Campo, supra,* 236 F.R.D. at 459. "Although in some cases a district court should allow discovery to aid the determination of whether a class action is maintainable, the plaintiff bears the burden of advancing a prima facie showing that the class action requirements of [Rule 23] are satisfied or that discovery is likely to produce substantiation of the class allegations." *Mantolete, supra*, 767 F.2d. at 1424.

Under Federal Rule of Civil Procedure 23(a), the requirements for a class action are:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

In addition to these requirements, Rule 23(b) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. Proc. 23(b)(3).

With the exception of showing that the proposed class is numerous, Martinet cannot make a prima facie showing that any of the class action requirements likely would be satisfied or that discovery is likely to produce substantiation of his class allegations.

**No Common Questions of Law or Fact:** Plaintiff's overbroad class definition consists of well over 10,000 employees working in almost every industry imaginable, with thousands of different job descriptions, and subject to 15 different California Wage Orders. There are no common questions of law or fact among a group of employees this diverse and subject to numerous different regulations. There is no authority or precedent for finding commonality among a group of employees that crosses so many different industries and job descriptions. Indeed, Martinet's purported class in this case is analogous to a class-action lawsuit brought against 3,000 of the state's employers in numerous different industries across the state. Obviously, that broad of a class would fail to meet Rule 23 requirements.

The proposed class includes employees placed by Spherion at tens of thousands of different projects, each with their own unique set of practices, procedures, and operative employment documents. Spherion employees are not subject to a singular set of uniform policies and procedures like large companies such as Wal-Mart or Hewlett Packard. The policies and procedures applicable to Spherion employees are customized and specifically tailored to thousands of clients and tens of thousands of different job assignments. Spherion employees at different assignments on different projects bear as much similarity to one another as a retail clerk at Wal-Mart shares with a Hewlett Packard IT consultant. There is no shared common experience among Spherion's employees to serve as the basis for a class action. Common questions of law and fact simply do not exist among this broadly diverse group of employees.

**No Typical Claims Or Defenses:** Because the proposed class is so diverse and crosses so many industries, Spherion may have numerous unique defenses to the wage-and-hour allegations in the complaint. In addition to asserting unique defenses based on the application of 15 different California Wage Orders, Spherion also will have individualized factual defenses based on the unique assignments, job duties, working conditions, and operative policies and procedures for each employee. Even if plaintiff could prove that policies or procedures applicable to him violated California law, defendant will have hundreds, if not thousands, of other policies or procedures to present as a defense to class-wide liability. To determine whether meal, rest period, and overtime laws were violated thousands of individual inquiries will have to be made.

**Martinet Is Not An Adequate Representative:** Martinet cannot demonstrate he is an adequate representative for a putative class of diverse state-wide Spherion employees in thousands of different job assignments across multiple industries. Martinet's job duties, assignment, and employment were very unique. His employment was subject to a unique contract and very specific policies and procedures. Only 4 other California employees perform a job similar to Martinet. He cannot adequately represent thousands of Spherion employees in unique assignments no more than a Hewlett Packard IT consultant could represent a Wal-Mart retail clerk in a class action.

**Common Issues Cannot Predominate:** With thousands of different job titles, countless job duties, and a plethora of individualized job assignments, a legion of individual issues will surely predominate over any common issues plaintiff might be able to raise. Perhaps the only common thread among the entire proposed class is at one time or another they were paid by Spherion. Beyond this sole shared experience, each employee or set of employees working on a particular assignment has been subject to different working environments, different job types, different client-specific procedures, different management and supervision structures, different site or assignment-specific practices and customs, different work orders or contracts, different instruction and training, and different time-recording practices and systems. For every alleged common issue, there will be at least 3,000 individual inquiries that must be made (representing the number of Spherion's California clients). The issues will further splinter from there to 15,000 different site-specific inquiries with a staggering number of job assignment permutations.

### B. The Court Should Prohibit All State-Wide Class Discovery Because It Will Not Substantiate Any Of Plaintiff's Baseless Class Allegations.

A reading of the complaint and FAC reveals nothing more than a form class complaint. The pleadings are devoid of any substantive allegations regarding Spherion's corporate structure, policies, or practices. All of plaintiff's allegations regarding Spherion's policies and practices are preceded by the disclaimer "on the basis of information and belief." (McKelvey Decl. ¶¶ 2-3, Exhibits A and B ¶¶ 32-34, 37-38, 41-43, 46-47, 52, 57, 59, 64, 66; Exhibit B ¶ 68.) Martinet worked with the company for less than six weeks on a unique assignment for a customer (EDS) of Spherion's client (Dell) at locations all over the country. It defies credulity to believe that Martinet could have come to even a basic understanding of how a company as complex and multifaceted as Spherion works or how its employees are given assignments at thousands of different locations in California. Despite repeated canned phrases to the contrary, the allegations in the complaint are not based on any specific information or belief but on speculation. Plaintiff cannot make even the most basic showing that his class as plead is viable.

Courts have routinely denied class-wide discovery in cases where plaintiff has alleged an overbroad class and has not made a basic showing the class is viable. In *Mantolete*, the Ninth Circuit held that the district court did not abuse its discretion in denying class-wide discovery in an asserted national class of disabled individuals against the United States Postal Service. *Mantolete, supra*, 767 F.2d. at 1424. In upholding the district court's denial of class-wide discovery, the Ninth Circuit suggested discovery was not necessary because it was apparent individual inquiries would have to be made on a case-by-case basis to determine who was part of the class. *Id.* at 1425.

In *Tracy v. Dean Witter Reynolds, Inc.*, the district court limited class discovery to one of defendant's offices and rejected plaintiffs' attempt to extend discovery to 400 of defendant's geographically dispersed offices. 185 F.R.D. 303, 304 -305 (D. Colo. 1998). Citing *Mantolete*, the court found that before class-wide discovery was allowed, plaintiffs must demonstrate that there was some factual basis for plaintiffs' claims of class-wide harm. *Id.* at 305. The court went on to say, "plaintiffs have not persuaded me that any discovery beyond [defendant's local office] is likely to produce substantiation of the class allegations which they have made…[E]xtended discovery should not be allowed to plaintiffs if they can present no evidence, or if they present insufficient evidence, to warrant a conclusion that extended discovery is reasonably likely to yield support for the class allegations which have been made, particularly if the extended discovery will result in prejudice to [defendant]." *Id.* at 305, 312.

Courts also have denied class certification without permitting any class certification discovery where plaintiff failed to establish a reasonable basis for class treatment. *See Doninger supra,* 564 F.2d at 1312-13 (upholding district court's denial of class certification prior to discovery because there was no reasonable possibility that plaintiff could satisfy Rule 23); *Lumpkin v. E.I. Du Pont de Nemours & Co.*, 161 F.R.D. 480, 481 (M.D. Ga. 1995) (refusing to order discovery from defendant and striking class allegations because the record failed to show any basis for further pursuit of a class action); *Rodriguez v. Department of the Treasury*, 108 F.R.D. 360, 361-362 (D.C. Dist. 1985) (denying class certification before discovery based on evidence demonstrating the Rule 23 requirements of numerosity and typicality were not met).

Reading the FAC and comparing it to the facts presented on this motion, it is clear that plaintiff filed his complaint not on information or belief, but on a speculative theory he hoped to substantiate with discovery. However, no amount of discovery will serve to substantiate plaintiff's form allegations against Spherion. The nature of Spherion's corporate structure and the manner in which its employees are assigned to diverse jobs throughout the state cannot be changed through discovery. As such, the court should prohibit class discovery and limit plaintiff's discovery to his individual job assignment.

### C. The Court Should Prohibit All Class-Wide Discovery Because It Is A Fruitless Fishing Expedition.

Although plaintiffs are typically permitted to conduct some pre-class certification discovery, courts may prevent "fishing expedition" type discovery and impose reasonable limitations as to scope. *Mantolete, supra*, 767 F.2d. at 1424 (citing *Donninger, supra*, 564 F.2d at 1313). "The district judge may reasonably control discovery to keep the suit within manageable bounds, and to prevent fruitless fishing expeditions with little promise of success." *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975); *see also Rivera, supra,* 364 F.3d at 1072 (stating "District courts need not condone the use of discovery to engage in "fishing expedition[s].") It is within the district court's discretion to deny plaintiff's attempt to obtain discovery in order to solicit support for his effort to certify a class. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985).

Martinet's broad-based, state-wide discovery requests are part of a belated effort to find facts and plaintiffs to support the form allegations in his complaint, which are currently based on "information and belief." Plaintiff's discovery asks whether Spherion has different meal and rest period policies and overtime policies, and demands that Spherion produce all such policies and explain the difference between these policies. (McKelvey Decl. ¶ 6, Exhibit E.) The results of such an enormous undertaking would reveal countless different policies, practices, and procedures in numerous job assignments across scores of industries, which would further undermine plaintiff's class allegations. This is precisely the type of fruitless fishing expedition that the court has the authority to prohibit under federal law. *See Blackie, supra,* 524 F.2d at 906; *see also Rivera, supra,* 364 F.3d at 1072.

Plaintiff's discovery also asks Spherion to identify by name, address, phone number, job title, job description, and dates of employment all of its California employees over the last four and a half years. (McKelvey Decl. ¶ 6, Exhibit E.) At this stage of the litigation, this request is nothing more than a search for potential clients. Given that plaintiff has no basis to support his class claims, the production of this information is irrelevant and an unwarranted intrusion on Spherion's employee's right to privacy (discussed *infra*). The Court should deny plaintiff's request for the identity of all state-wide employees as an improper attempt to obtain discovery in order to solicit support for his effort to certify a class. *Hatch, supra,* 758 F.2d at 416.

### D. There Is Good Cause For A Protective Order Prohibiting Or Prescribing Class Discovery.

Upon a showing of good cause, the district court may issue any protective order "'which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' including any order prohibiting the requested discovery altogether, limiting the scope of the discovery, or fixing the terms of disclosure." *Rivera, supra,* 364 F.3d at 1063 (quoting Federal Rule of Civil Procedure 26(c)(1)). As demonstrated above, responding to discovery would require an estimated 25,160 man hours at a total monetary cost of $585,000. (Orzo Decl. ¶¶ 23-29; Echeverria Decl. ¶ 8.) Thus, plaintiff's class discovery is oppressive and constitutes an enormous and undue burden on Spherion.

In determining the manner and scope of pre-class-certification discovery, the court must consider its need, the time required, and the probability of discovery resolving any factual issue necessary for class determination. *Kamm, supra,* 509 F.2d at 209 -210. District courts should also balance the need to promote effective case management, the need to prevent potential abuse, and the need to protect the rights of all parties. *Tracy, supra,* 185 F.R.D. at 305. The discovery should not be "so broad that the discovery efforts present an undue burden to the defendant." *Id.* "Where the necessary factual issues [related to class certification] may be resolved without discovery, it is not required." *Kamm, supra,* 509 F.2d at 209-210.

The unlikely benefits plaintiff will gain from receiving thousands of individualized documents (undermining his class case) cannot outweigh the enormous burden on defendants. *See Ricotta v. Allstate Ins. Co.*, 211 F.R.D. 622 (SD Cal 2002) (motion to compel denied because burden and expense of producing every report created by an insurance company outweighed the likely benefit). The burden associated with the time and effort required to produce this discovery far outweighs the probability of the discovery resolving any factual issue necessary for class determination. *See Kamm, supra,* 509 F.2d at 209-210 (9th Cir. 1975). Spherion has adequately demonstrated good cause for the issuance of a protective order.

**E. Plaintiff's Discovery Violates The Privacy Rights of Spherion Employees.**

There is no mandatory duty that a defendant disclose the names and addresses of putative class members whenever a plaintiff files suit on behalf of a class. *See Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165, 169 (1989). Spherion's employees have a constitutionally guaranteed right to the privacy of their contact information. CAL CONST. art. 1, § 1. As noted in *Board of Trustees v. Superior Court,* 119 Cal.App.3d 516, 525 (1981) (citations omitted), "[t]he constitutional right of privacy is 'not absolute'; it may be abridged when, but only when, there is a 'compelling' and opposing state interest." *Id.* at 525. The disclosure of private information "will *not* be constitutionally justified simply because inadmissible, and irrelevant, matter sought to be discovered *might* lead to other, and relevant evidence." *Id.* (emphasis in original). Even when the discovery of private information is found to be directly relevant to the issues of ongoing litigation, it is not automatically allowed; there must then be a "careful balancing" of the "compelling public need" for discovery against the "fundamental right of privacy." *Id.* Even if the information sought is found to on balance require disclosure "the scope of such disclosure will be narrowly circumscribed; such an invasion of the right of privacy 'must be drawn with narrow specificity.'" (*Id.*)

Plaintiff has propounded class discovery that seeks the names, addresses, telephone numbers, job titles, job descriptions, and dates of employment for every Spherion employee from September 2003 to the present. (McKelvey Decl. ¶ 6, Exhibit ¶ E.) Defendant objected to this discovery on the grounds that it violated Spherion employees' right to privacy. (McKelvey Decl. ¶¶ 10, 15, Exhibits I, N.) In his meet-and-confer letter, plaintiff cited a litany of cases purportedly standing for the proposition that Spherion's privacy objection is invalid under California law. None of the decisions factually resemble the situation currently before the court. Plaintiff has not and cannot cite a single case wherein a company (let alone a temporary staffing company) was required to disclose the names, addresses, phone numbers, job descriptions, and dates of employment for thousands of unrelated employees in different positions and at different locations. None of the cases plaintiff cites stand for this broad of a proposition. Each case can be factually distinguished from the issues currently before the Court.

**1. Plaintiff's Case Is Far Different Than The *Pioneer Electronics* Case.**

First, Plaintiff cites to *Pioneer Electronics, Inc. v. Superior Court*, 40 Cal. 4th 360 (2007) for the proposition that the contact information of putative class members is discoverable. In *Pioneer*, a consumer class action, plaintiff sought the contact information of each individual who complained about a specific defective DVD player *after* he had received, in separate discovery, copies of customer complaints with redacting to obscure the customers' information. The court held that Plaintiff was entitled to the information, reasoning that the individuals who complained had a reduced expectation of privacy, because they had "already voluntarily disclosed their identifying information to the company." *Id.* at 372. The court authorized an opt-out notice procedure, requiring notice to each DVD purchaser of the proposed disclosure and an opportunity to object. *Id.*

Martinet has not brought a consumer class action. Nor has he made a narrow request for the identifying information of individuals previously disclosed in discovery as potential witnesses. Instead, Martinet seeks the contact information of over 10,000 past and current Spherion employees without first having established that there were any complaints against the company, or that Spherion has a policy in place that violates California's wage-and-hour laws. Martinet's request is akin to a request by the plaintiff in *Pioneer* for the identifying information of all Pioneer customers for all products (as opposed to just DVD players) over a four and a half year period. Such a request was not made or adjudicated in *Pioneer* and would likely have been rejected by the court in that case. Plaintiff cannot rely on *Pioneer* to authorize the disclosure of the identities of thousands of unrelated Spherion employees.

**2. The *Belaire-West Landscaping* Case Is Distinguishable.**

Plaintiff also cites *Belaire-West Landscaping, Inc. v. Superior Court,* 149 Cal. App. 4th 554 (2007). Relying almost exclusively on the court's ruling in *Pioneer*, the court in *Belaire-West* held that the contact information of current and former employees of a 50-person landscaping service was discoverable. The court authorized an opt-out procedure that required notice to the individuals allowing them to object to the dissemination of their personal information in writing. (*Id.* at 561) The court pointed out that the "privacy concerns here are more significant than those in *Pioneer*, where the complaining consumers voluntarily disclosed their information to the company in the hope of gaining some relief for their allegedly defective DVD players." *Id.*

*Belaire-West* was based on the following premise:

> Just as the dissatisfied Pioneer customers could be expected to want their information revealed to a class action plaintiff who might obtain relief for the defective DVD players (citing Pioneer) so can current and former Belaire-West employees reasonably be expected to want their information disclosed to a class action plaintiff who may ultimately recover for them unpaid wages that they are owed. *Id.*

The same premise is not present in Martinet's case. Unlike the *Belaire-West* employees, many of Spherion's employees are temporary employees. Many of these employees may have worked at an assignment for Spherion for only one or several days. These employees may actually not want their information disclosed to a class action plaintiff. Temporary employment has an entirely different stigma and set of expectations associated with it than full time employment. Some employees may be embarrassed or may not want to reveal that they sought out temporary employment. This is especially true in a situation like this where (as discussed supra) plaintiff has no real chance of sustaining a class action. Many Spherion employees (especially those employed for only a few days) may decide that the value of any potential de minimus recovery is not worth the disclosure of their information or their time.

The discovery Martinet seeks is more vast and invasive than the information sought in *Belaire-West*. The plaintiff in that case sought the name and addresses of employees for a 50 person landscaping firm in a single geographic location. Martinet, however, seeks far more than the basic contact information sought in *Belaire West* and *Pioneer*. Martinet seeks the job title, job description, and dates of employment for thousands of unrelated employees all over California. This information is far more detailed and private than the basic contact information requested in *Pioneer* and *Belaire West*. This information actually discloses a piece of plaintiff's employment history akin to what would be submitted on a resume or job application. A Spherion employee, who worked for the company for a few weeks doing something outside of their education or job training, may not want others to know they took a job below their qualifications. Plaintiff cannot cite any authority that would permit such a broad and intrusive disclosure of information for thousands of California citizens across the state.[4]

### 3. Plaintiff's Discovery Is Unlike The Discovery At Issue In *Putnam v. Eli Lilly.*

Finally, plaintiff's reliance on *Putnam v. Eli Lilly and Co.*, 508 F. Supp. 2d 812 (2007) is misplaced. In *Putnam*, a suit brought on behalf of Eli Lilly pharmaceutical representatives for failure to pay overtime wages, the court balanced the employees' privacy rights with plaintiff's need for their contact information, and determined that plaintiff's needs were greater. *Id.* However, in so ruling, the court noted that it ordered defendant to provide the information because defendant failed to offer an "adequate explanation as to why information about pharmaceutical representatives in sales divisions other than the one in which plaintiff worked is not relevant to the inquiry." *Id.* at 814. Here, Spherion has offered numerous legitimate reasons why Plaintiff's wide-ranging and overly inclusive request concerning all of Spherion's California-based employees is not relevant. Unlike in *Putnam*, Martinet's request here is not limited to a single employee classification. Rather, Plaintiff seeks information concerning all of Spherion's California-based employees with thousands of different job titles and even more diverse job duties.

In all, the request in *Putnam* involved 348 pharmaceutical representatives and the court concluded that the information concerning this group of employees was necessary to determine

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[4] Another case plaintiff cites, *Puerto v. Superior Court (Wild Oats Markets, Inc.)*, 158 Cal. App. 4th 1242 (2008) is distinguishable. In *Puerto*, the court compelled disclosure of the names and addresses of witnesses that had already been identified by name in response to discovery requests seeking the identity of witnesses to the action. Because defendant had identified the individuals as witnesses, the court ordered disclosure of their contact information. This is not the issue presently before this Court as none of the more than 10,000 employees plaintiff seeks to identify has been identified as a witness in this action.

"common questions of law or fact." *Id.* Here, Martinet cannot establish common questions of law or fact common to his proposed class due to the diversity and rampant individuality among Spherion employees. As noted by the court in *Severtson v. Phillips Beverage Co.* 137 F.R.D. 264, 266 (D. Minn. 1991), "courts, as well as practicing attorneys, have a responsibility to avoid the 'stirring up' of litigation through unwarranted solicitation." Since Martinet cannot show that "discovery is likely to produce substantiation of the class allegations[,]" the imposition on the privacy rights of Spherion employees clearly outweighs plaintiff's attempts at a fishing expedition only intended to "stir up" a class. *See Mantolete, supra*, 767 F.2d at 1425

**V. CONCLUSION**

For the abovementioned reasons, the Court should grant this motion for a protective order barring class-wide discovery in this lawsuit.

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